



Australian Government

Australian Government Submission

*Senate Legal and Constitutional Affairs Legislation Committee
inquiry into the Crimes Legislation Amendment (Law
Enforcement Integrity, Vulnerable Witness Protection and
Other Measures) Bill 2013*

June 2013

Introduction

1. The Australian Government welcomes the opportunity to provide the Senate Legal and Constitutional Affairs Legislation Committee with this submission as part of the inquiry into the Crimes Legislation Amendment (Law Enforcement Integrity, Vulnerable Witness Protection and Other Measures) Bill 2013 (the Bill).
2. The Bill was introduced to the House of Representatives on 29 May 2013 and is expected to be passed in the Winter 2013 sittings.
3. Consistent with principal issues for consideration noted in the Selection of Bills Committee Report, this submission addresses the amendments relating to people smuggling and the use of wrist x-rays in Schedule 3 of the Bill.
4. This submission was prepared by the Attorney-General's Department (AGD) in collaboration with the Australian Federal Police (AFP), the Commonwealth Director of Public Prosecutions (CDPP), the Department of Immigration and Citizenship (DIAC), and the Australian Customs and Border Protection Service (Customs).
5. The Australian Government notes that its comments in this submission should be read in conjunction with the views expressed in its June 2012 submission to the Senate Legal and Constitutional Affairs References Committee inquiry into the Detention of Indonesian minors in Australia (at **Attachment A**), and the Government's response to that inquiry (at **Attachment B**).

Overview of people smuggling measures in the Bill

6. The Bill will amend the *Crimes Act 1914* to remove references to wrist X-rays in the Crimes Act. Once this amendment has been made, wrist X-rays can be removed from the regulations as a prescribed procedure for determining whether people smuggling crew are minors.
7. The Bill will formalise current practice by ensuring that the prosecution bears the onus of proof in relation to establishing age by amending the *Migration Act 1958* to include s236D which provides that, where age is at issue during court proceedings for people smuggling offences, the burden of proof rests with the prosecution.
8. In addition, the Bill will make technical and enabling amendments by amending the Migration Act to include s236C and s236E. The Amendments to the Migration Act in s236C will allow the use of evidentiary certificates for factual matters in people smuggling proceedings; and s236E will ensure time spent in immigration detention and on remand are taken into consideration during sentencing for people smuggling offences.

Comments on the measures proposed in the Bill

Wrist X-rays

9. The Bill will amend the *Crimes Act 1914* to remove references to wrist X-rays in the Crimes Act. Once this amendment has been made, wrist X-rays can be removed from the regulations as a prescribed procedure for determining whether people smuggling crew are minors.

10. This will not affect current practice as wrist X-rays have not been offered as a method of determining age by the Australian Federal Police since August 2011, unless requested by the defendant. It remains open to DIAC, the AFP and CDPP to use any method or combination of methods to determine whether a person is more likely than not to be a minor.

11. These amendments, along with the proposed regulation change to remove wrist X-rays as a prescribed procedure address in particular Recommendation 1 of the Majority Report of the Senate Legal and Constitutional Affairs References Committee inquiry into the Detention of Indonesian Minors in Australia, which stated:

Subject to the advice of the Office of the Chief Scientist regarding the utility of wrist X rays as an age assessment tool, and noting evidence received by the committee raising significant doubts about this procedure, the committee recommends that the Australian Government consider removing wrist X-rays as a prescribed procedure for the determination of age under 3ZQB of the Crimes Act 1914 and regulation 6C of the Crimes Regulations 1990.

12. Further, these amendments address recommendations surrounding the use of wrist X-rays contained in the Australian Human Rights Commission's report entitled 'The Age of Uncertainty: Inquiry into the treatment of individuals suspected of people smuggling offences who say that they are children'.

13. The proposal to remove wrist X rays as a prescribed procedure will not change current age determination processes, but will respond to criticisms about the use of wrist X rays and is supported by the Office of the Chief Scientist which has expressed the view that there is not sufficient scientific data to support the use of wrist X rays to determine whether a person is a minor.

Age determination

14. Provisions in the Migration Act establishing that mandatory minimum penalties for people smuggling offences do not apply to persons under the age of 18 do not currently specify whether the prosecution or the defence bears the burden of proof in establishing whether someone is an adult. In practice, the prosecution has assumed the burden of proof in establishing that some is an adult.

15. These proposed amendments will align the legislation with current practice, and will address Recommendation 6 of the Majority Report of the Senate Legal and Constitutional Affairs References Committee report into the Detention of Indonesian minors in Australia which stated:

In accordance with Recommendation 2 of the Senate Legal and Constitutional Affairs Legislation Committee's report into the Crimes Amendment (Fairness for Minors) Bill 2011, the committee recommends that the Australian Government introduce legislation to expressly provide that, where a person raises the issue of age during criminal proceedings, the prosecution bears the burden of proof to establish that the person was an adult at the time of the relevant offence.

Technical and enabling amendments

16. The Bill will make a number of technical and enabling amendments to streamline investigations and prosecutions for people smuggling crew. These amendments will allow the use of evidentiary certificates in people smuggling proceedings; and ensure time spent in immigration detention and on remand are taken into consideration during sentencing for people smuggling offences.

17. These measures will assist to alleviate delays in people smuggling investigations, and will also alleviate pressures on Border Protection Command crew resulting from the need for significant numbers of crew to give evidence in people smuggling prosecutions. This will result in persons accused of people smuggling offences spending less time in custody or immigration detention.

18. Evidentiary certificates will contain material that is not likely to be in dispute. Under certain circumstances, the person charged is entitled to require the person who issued the certificate to attend court as a witness. The person who issued the certificate would appear as a witness for the prosecution and would be available for cross examination by the person charged. An accused person is entitled to challenge the contents of an evidentiary certificate in court.

19. The Bill provides that any evidence given in rebuttal of an evidentiary certificate must be considered on its merits and not discounted by reason of the fact that an evidentiary certificate has been admitted into evidence.

20. The Bill will clarify that any time spent in immigration detention and remand are to be taken into account when sentencing people smuggling offenders. In practice, courts are already taking this time into account when sentencing.

Conclusion

21. The people smuggling amendments contained in this Bill will enhance the effectiveness and efficiency of the investigatory and prosecutorial process.

22. The removal of wrist X-rays as a prescribed procedure is consistent with current investigative and prosecutorial practice and implements key recommendations from the Senate Legal and Constitutional Affairs Reference Committee report into the Detention of Indonesian minors in Australia.